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Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

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SENSITIVE

RAD REFFERAL: 12L-87
DATE OF REFERRAL: 11/08/12
DATE ACTIVATED: 05/06/13
DATE OF NOTIFICATION: 11/15/12
RESPONSE RECEIVED: 1/11/13

EXPIRATION OF SOL: 01/13/17 - 3/20/17
ELECTION CYCLE: 2012

SOURCE: Internally Generated

RESPONDENTS: Winning Our Future and Brent A. Mudd
in his official capacity as treasurer

**RELEVANT STATUTES AND
REGULATIONS:** 2 U.S.C. § 431(17)
2 U.S.C. § 434(b), (g)
11 C.F.R. § 104.4(c)

INTERNAL REPORTS CHECKED: Disclosure Reports
RAD Referral Materials

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Reports Analysis Division ("RAD") referred Winning Our Future and Brent A. Mudd in his official capacity as treasurer (the "Committee" or "Respondent") to the Office of General Counsel ("OGC") for failing to timely file six 24-Hour Reports of independent expenditures totaling \$1,618,146.41 and for failing to timely disclose additional disbursements totaling \$163,430.10. See RR 12L-87 (Winning Our Future) ("Referral"). The Committee acknowledges that it untimely filed 24-Hour Reports but requests that the Commission dismiss the referral because the Committee's errors related to its independent expenditure filings were the inadvertent actions of a newly formed independent-expenditure only political committee.

2013 JUL -5 PM 12: 49

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1 Resp. at 1, 3-4 (Jan. 11, 2013). We recommend that the Commission open a matter under
2 review, find reason to believe that the Committee violated 2 U.S.C. § 434(b) and 434(g) and
3 11 C.F.R. § 104.4(c),
4

5 **II. FACTUAL AND LEGAL ANALYSIS**

6 **A. Failure to Timely File 24-Hour Reports**

7 An independent expenditure is an expenditure that expressly advocates the election or
8 defeat of a clearly identified federal candidate and is not made in concert or cooperation with, or
9 at the request or suggestion of, the candidate or his authorized committee or agent. 2 U.S.C.
10 § 431(17). A political committee that makes or contracts to make independent expenditures
11 aggregating \$1,000 or more after the 20th day, but more than 24 hours, before the date of an
12 election shall file a report within 24 hours describing the expenditures. 2 U.S.C. § 434(g)(1);
13 11 C.F.R. § 104.4(c). These reports, known as 24-Hour Reports, must be filed with the
14 Commission within 24 hours "following the date on which a communication that constitutes an
15 independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R.
16 § 104.4(c). The Committee shall file additional reports within 24 hours after each time it makes
17 or contracts to make independent expenditures aggregating \$1,000. *Id.*

18 On February 20, 2012, the Committee timely filed its 2012 February Monthly Report; on
19 March 20, 2012, the Committee amended its 2012 February Monthly Report. Based on its
20 review of the independent expenditures itemized on the amended report, RAD concluded that the
21 Committee did not timely file six 24-Hour Reports for seventeen independent expenditures

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1 totaling \$1,618,146.41, *inter alia*.¹ See Referral, Attach. 2. Accordingly, on April 25, RAD sent
2 the Committee a Request for Additional Information ("RFAI") regarding the Committee's
3 apparent failure to timely file the required 24-Hour reports. See April 25, 2012, RFAI,
4 <http://images.nictusa.com/pdf/522/12330005522/12330005522.pdf#navpanes=0>.

5 On September 11, 2012, the Committee filed a Miscellaneous Form 99 ("Sept. 11 Form
6 99") in response to the RFAI. The Committee noted that it "has to date filed reports itemizing
7 over \$23 million in expenditures, including eighty-seven 24- and 48-hour reports"; asserted that
8 it "met its obligation to submit information in a timely fashion"; and that vendor delays in
9 providing necessary information contributed to the Committee's amendments. Sept. 11 Form 99,
10 <http://images.nictusa.com/pdf/415/12952877415/12952877415.pdf#navpanes=0>.

11 RAD subsequently referred the apparent violations to OGC. OGC notified the
12 Respondent of the referral in accordance with the Commission's policy regarding notification in
13 non-complaint generated matters. 74 Fed. Reg. 38167 (Aug. 4, 2009). In response, the
14 Committee acknowledges the late filings and contends that the volume of expenditures made in
15 January and February 2012 alone, \$14.8 million, "led to miscommunications and oversights,
16 regarding certain 24-Hour reports." Resp. at 2-3.

17 The Committee, however, argues that the Commission should dismiss the matter. The
18 Committee asserts that it relied on vendors who were oftentimes inexperienced with the
19 Commission's reporting rules, had a treasurer with no prior experience, and no paid employees.
20 See Resp. at 1-3; Attach. A ¶ 2, 3. (Aff. of Brent A. Mudd). The Committee concludes therefore

¹ RAD originally identified 22 independent expenditures totaling \$1,623,643.31 for which the Committee failed to timely file a 24-Hour Report. Referral at 2. The amount included in this referral is less because five of the independent expenditures cited in the RFAI were not referable for further action. See Referral, fn.1. Specifically, RAD determined that the five reports filed for payments made to Intellimarc Inc. (totaling \$6,596.28) were not referable for further action because the Committee timely filed 24-Hour Reports before the applicable election.

1 that these factors contributed to the Committee's reporting failures.² *Id.* at 2. The Committee
2 also notes that it took remedial action "on its own initiative." *Id.* at 3-4. Finally, the Committee
3 argues that its late reporting was sufficient and did not harm the electoral process because the
4 total cost of the late filed independent expenditures represented only 10% of the Committee's
5 total expenditures for that period. *Id.* at 4. And despite its late filings, the Committee argues that
6 timely disclosure "would not have materially added to or altered the public's understanding of
7 the activities of this Committee" because its expenditures were widely reported in local and
8 national publications. *Id.* at 5.

9 We do not find these arguments compelling, however. The amount in violation was well
10 in excess of the applicable referral threshold, and the record suggests that the Committee was
11 represented by experienced compliance professionals, *see supra* fn 2. Further, while the
12 Committee may have disclosed the relevant information on its own initiative, it did so *after* the
13 relevant primary. Finally, we do not consider general articles in the press about the Committee's
14 activities to be a substitute for the filing of Commission disclosure reports. Clearly, disclosure
15 reports contain greater details and their accuracy is enforced by law.

16 As set forth in the Referral and acknowledged by the Committee, the Committee failed to
17 timely file six 24-Hour Reports totaling \$1,618,146.41 to support seventeen independent

² Other information, however, indicates that the Committee's staff was not completely inexperienced. Rebecca A. Burkett, one of the Committee's directors, and reportedly the creator and president of the Committee, previously served as the chief development officer for American Solutions for Winning the Future, a Gingrich-related 527 organization. *See Winning Our Future*, FACTCHECK.ORG (Jan. 10, 2012) updated July 25, 2012, <http://www.factcheck.org/2012/01/winning-our-future/>; Alexandra Burns, "Winning Our Future," POLITICO (Dec. 13, 2011), <http://www.politico.com/blogs/burns-haberman/2011/12/winning-our-future-107254.html>. She was also paid for "PAC Fundraising Consulting" by the related American Solutions PAC in 2010.² *See* American Solutions PAC 2010 General Election Report filed Dec. 2, 2010 at <http://images.nictusa.com/cgi-bin/fecimg/?10931951269>; <http://images.nictusa.com/cgi-bin/fecimg/?10931951274>. The Committee treasurer is a certified public accountant, who states in his affidavit: "In December 2011, prior to registering with the FEC, the Committee retained experienced FEC counsel to assist with compliance matters and reporting." Resp., Attach. ¶ 5. And the treasurer acknowledges that the Committee regularly consulted with counsel throughout this reporting period. *See* Resp., Attach. ¶ 5, 6.

1 expenditures made in support of, or opposition to, two federal candidates, as required by
2 2 U.S.C. § 434(g)(1) and 11 C.F.R. § 104.4(c). Referral at 1. Accordingly, we recommend that
3 the Commission find reason to believe that Winning Our Future violated 2 U.S.C. § 434(g)(1)
4 and 11 C.F.R. § 104.4(c).

5 **B. Failure to Disclose Disbursements**

6 As discussed above, the Committee amended its 2012 February Monthly Report on
7 March 20; the amendment disclosed \$140,930.10 that was not disclosed on the original report.
8 Referral at 3. Also on March 20, the Committee timely filed its 2012 March Monthly Report;
9 the Committee subsequently amended that report on April 5. The Amended 2012 March
10 Monthly Report disclosed \$22,500 in disbursements that were not disclosed on the original
11 report. *Id.* at 4. Under the Act and Commission regulations, political committees must disclose
12 their disbursements, including independent expenditures. *See* 2 U.S.C. § 434(b)(4)(H)(iii);
13 11 C.F.R. § 104.3(b)(1)(vii).

14 On August 7, 2012, RAD sent the Committee an RFAI detailing the increased
15 disbursements on the amended February and March monthly reports and requesting clarification
16 regarding the increases. *See* Aug. 7, 2012, RFAI,
17 <http://images.nictusa.com/pdf/429/12330016429/12330010429.pdf>; *see also* Referral, Attach. 3.
18 On its Sept. 11 Form 99, the Committee responded that the bulk of the disbursements reported on
19 the Amended 2012 February and March Monthly reports had been disclosed in amended 24-
20 Hour or 48-Hour Reports. *See* Sept. 11 Form 99,
21 <http://images.nictusa.com/pdf/415/12952877415/12952877415.pdf#navpanes=0>; Referral at 5.
22 The Committee explained that vendor error resulted in the Committee receiving an invoice for a
23 late January expenditure totaling \$36,650.10, after the February monthly filing deadline and that

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1 the volume of its expenditures and vendor delays resulted in delayed reporting. *Id.* RAD
2 subsequently referred the matter to OGC pursuant to *RAD Review and Referral Procedures for*
3 *Authorized Committees for 2011-2012 Election Cycle* (the "Referral Procedures") (approved by
4 Commission Apr. 5, 2011).³ The Committee's Response to the notification of the referral, *see*
5 *infra* at 3, does not specifically address this portion of the referral.

6 We recommend that the Commission find reason to believe that Winning Our Future
7 violated 2 U.S.C. § 434(b)(4).⁴ In sum, the Committee filed an Amended 2012 February
8 Monthly Report disclosing \$9,360,569.68 in independent expenditures, compared to
9 \$9,219,639.58 in independent expenditures on its original 2012 February Monthly Report. The
10 Committee also filed an Amended 2012 March Monthly Report disclosing \$5,461,894.81 in
11 independent expenditures, compared to \$5,439,394.81 in independent expenditures on its
12 original 2012 March Monthly Report. The combined total increase for the Amended 2012
13 February and March Monthly Reports is \$163,430.10.

³ Standard 7 of those procedures states: "[a] referral may be made to OGC if the increase or decrease in activity (receipts plus expenditures plus debts) aggregates in excess of \$100,000 on amendments filed to reports covering the current and/or previous cycles, which were received during the current election cycle." *See Referral Procedures* at 75-76.

⁴ Recently, in other matters in which OGC made recommendations based on the aggregate increased activity threshold in the Referral Procedures, the Commission found reason to believe for only some of the reports RAD referred. In some matters, the Commission found reason to believe only with respect to those amended reports for which the amount in violation met a Standard 7 per report increase in activity referral threshold. *See, e.g.*, MUR 6705 (Freedom and Prosperity PAC), MUR 6706 (Schiff for Senate), MUR 6707 (Visclosky for Congress), MUR 6708 (Carney for Congress). In other matters, the Commission found reason to believe only with respect to those amended reports for which the amount in violation exceeded \$10,000 per report, and the remaining amounts in violation in the aggregate exceeded \$100,000. *See, e.g.*, MUR 6709 (Bachmann for Congress), MUR 6710 (Trout Franken). In still other matters, the Commission approved the referred amount in violation, but reduced the civil penalty. *See, e.g.*, MUR 6725 (Ron Paul). In addition, the Commission, for a variety of reasons, closed without action a number of referrals that RAD had made to OGC under Standard 7. *See, e.g.*, RR 12L-84 (Friends of Pat Toomey); RR 12L-13 (Buck for Colorado); RR 12L-02 (Michael Grimm for Congress); RR 12L-12 (Our Future Ohio PAC).

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IV. RECOMMENDATIONS

1. Open a matter under review with respect to RR 12L-87.
2. Find reason to believe that Winning Our Future and Brent A. Mudd in his official capacity as treasurer, violated 2 U.S.C. § 434(b).
3. Find reason to believe that Winning Our Future and Brent A. Mudd in his official capacity as treasurer, violated 2 U.S.C. § 434(g).
- 4.
5. Approve the attached Factual and Legal Analysis.
6. Approve the appropriate letter.

Anthony Herman
General Counsel

7-2-13
Date

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